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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-677

ARTHUR YOUNG & COMPANY, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER ARTHUR YOUNG & COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF OF PETITIONER ARTHUR YOUNG & COMPANY

The brief submitted on behalf of the Securities and Exchange Commission ("the Commission") in opposition to the petition for *certiorari* vividly demonstrates the vice which Arthur Young & Company ("Arthur Young") is attacking in this proceeding and offers an additional reason why review by this Court is essential.

According to the Commission's theory, as adopted by the Court of Appeals, an administrative agency has only to specify broad, vague topics of investigation for its staff to have unbridled discretion to compel a private party to produce any piece of paper in its possession. Commission Brief at 11. Ironically, under this approach the broader and more vague the agency description of the investigation, the broader the latitude of the staff in demanding documents without effective scrutiny by either the agency or the courts.

We respectfully submit that this approach renders virtually meaningless the Constitutional rights to privacy and to be free from unreasonable searches; and it converts the courts into rubber stamps for agency staffs and makes the courts participants in a violation of law. In recent months, this Court has condemned warrantless searches by administrative agencies on just these grounds.

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search.

Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483, 4487 (U.S. May 23, 1978).

The situation facing the Court in the instant case is no different. The issue is not, as the Commission poses it (Commission Brief at 2), whether an agency may seek information which is relevant and material to its investigation,[1] but what standard determines whether the information is, in fact, relevant and material on other than an agency staff's *ipse dixit*. The Court of Appeals has permitted the Commission to give its staff the same "unbridled discretion" to conduct, in effect, a warrantless search of Arthur Young's files. As demonstrated in our petition, this not only does violence to the plain requirements of the securities laws, but also it breaches fundamental principles of constitutional and administrative law. We believe it important that this Court review this type of conduct now.

I. THE CASE IS NOT MOOT

In its brief, the Commission contends that this case is moot because Arthur Young complied with the subpoena while the case was pending before the Court of Appeals. Commission Brief at 7. This is not so.

First, the District Court order required Arthur Young to produce documents for examination in each of the fifteen cities where the documents were located. The Commission staff has not as yet examined Arthur Young's documents in the majority of these cities, nor has it ever advised Arthur Young either that it does not intend to do so or that the investigation has been concluded. Accordingly, production of documents by Arthur Young pursuant to the subpoena is presumably not complete.

[1] Arthur Young never contested the right of the Commission staff to seek relevant and material information. In fact, the record is clear that Arthur Young complied, at substantial expense, with the Commission staff requests for documents and that it was only when the staff's demand for documents changed from the specific to the all-encompassing that Arthur Young resisted.

Second, in oral argument before the Court of Appeals, Commission counsel confirmed that production of documents was incomplete. There have been no subsequent requests by the staff for additional production.

Third, in any event, the order of the Court of Appeals permits Arthur Young to seek reimbursement of the unreasonable expenses incurred by it in compliance with the subpoena. A determination by this Court that the subpoena was unlawfully broad would render unreasonable much of the expense incurred by Arthur Young in producing documents, which, in turn, would increase Arthur Young's right to reimbursement.

For any of these reasons, the case is not moot.

II. THE COMMISSION'S ASSERTION THAT ALL OF A PRIVATE PARTY'S DOCUMENTS MAY APPROPRIATELY BE EXAMINED BECAUSE AN INVESTIGATION WAS BROAD RENDERS CONSTITUTIONAL PROTECTIONS AND JUDICIAL REVIEW MEANINGLESS

According to the Commission, all that a court need do in considering whether to enforce a subpoena is compare the relevance of the requested materials "to the subject matter of the investigation." Commission Brief at 11. The Commission argues that it was engaged in a broad investigation of SCA Services, Inc. ("SCA"), including its "financial statements" and thus, a subpoena for *all* of Arthur Young's documents pertaining to SCA and to anyone who might have had anything to do with SCA could not have been overly broad.

If a court is bound by an agency's broad, vague definition of the scope of an investigation and must, in a

subpoena enforcement proceeding, do no more than compare the relevance of requested documents to the agency's definition of the investigation, judicial review of agency subpoenas is meaningless. Where, as here, an agency abdicates its statutory responsibility and gives its staff the broadest possible discretion by defining the scope of the investigation to encompass virtually every aspect of a company's business, that rule would effectively deprive a subpoenaed party of any means of testing the subpoena.

Denial of this petition will encourage the Commission and its staff to continue this type of egregious conduct which is, unfortunately, not limited to this case. Accounting firms like Arthur Young, and other entities, are all too frequently faced with broad subpoenas like that issued in this case. As one of the Commission's staff accountants candidly admitted during the California CPA Foundation on the SEC Update Program on November 15-16, 1978:

> The [Commission's] Division of Enforcement generally when it issues a subpoena for documents will in fact ask for more documents than it really needs. This is particularly true for accounting firms.

The Court of Appeals' decision permits this type of behavior to continue with the assistance of a court; it destroys the statutory scheme for judicial review of administrative agency subpoenas; and it renders meaningless the right to privacy and the freedom from unreasonable searches that every person has under the Fourth Amendment.

It is not enough to answer, as the Commission does (at 11), that the Court of Appeals solved this problem by ordering the Commission to reimburse Arthur Young for the unreasonable expense of complying with the subpoena.

Congress intended that a meaningful lawsuit would exist if a dispute arose over compliance with an administrative subpoena and that a court would decide the appropriate scope of the subpoena in light of constitutional and statutory consideration. What the court has done below is make two law suits out of one: the first, when the subpoena is enforced, and the second, when reimbursement is considered. Contrary to the approach taken by the Court below, the issue now before this Court is whether a Government agency may use compulsory process and secure otherwise private documents, not whether Arthur Young should be paid for this intrusion.

III. THE DECISION IN ISSUE HERE SQUARELY CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT CITED IN THE PETITION

The Commission contends that there is no conflict between the decision below and *CAB v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), but its only real basis is that the *United* case involved the CAB, while this case involves the SEC. Commission Brief at 12. The uncontroverted fact is that both cases involve precisely the same type of agency conduct. By specifying a broad, vague topic of investigation which intrudes into virtually every aspect of a corporation's business, the SEC is acting no differently here than the CAB acted in *United*. Yet, as the Seventh Circuit held, the CAB's conduct was improper because that agency failed, first, to state specifically the purpose of its investigation and, then, to frame requests for documents relevant to that specific purpose. The decision below would obviate the specificity inherent in the Fourth Amendment and required by the Seventh Circuit.

Accordingly, there is a most direct conflict between the decision of the Seventh Circuit in *United* and the D.C. Circuit in this case. It is important for this Court to resolve that conflict now.

IV. CONCLUSION

For the reasons set forth in our petition and in this brief, we respectfully submit that the petition for *certiorari* should be granted.

Dated: December 18, 1978

Respectfully Submitted,

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